

HOUSE BILL REPORT

HB 1076

As Reported by House Committee On:

Labor & Workplace Standards
Appropriations

Title: An act relating to allowing whistleblowers to bring actions on behalf of the state for violations of workplace protections.

Brief Description: Allowing whistleblowers to bring actions on behalf of the state for violations of workplace protections.

Sponsors: Representatives Hansen, Fitzgibbon, Berry, Dolan, Johnson, J., Ramos, Simmons, Ramel, Ortiz-Self, Gregerson, Ryu, Bronoske, Valdez, Callan, Kloba, Hackney, Chopp, Ormsby, Stonier, Frame, Santos, Macri, Pollet and Harris-Talley.

Brief History:

Committee Activity:

Labor & Workplace Standards: 1/22/21, 2/5/21 [DPS];

Appropriations: 2/17/21, 2/22/21 [DP2S(w/o sub LAWS)].

Brief Summary of Second Substitute Bill

- Authorizes a qui tam action for enforcement of various employment laws under which a relator on behalf of an agency may pursue relief.
- Specifies the distribution of any penalties or damages awarded.

HOUSE COMMITTEE ON LABOR & WORKPLACE STANDARDS

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 4 members: Representatives Sells, Chair; Berry, Vice Chair; Bronoske and Ortiz-Self.

Minority Report: Do not pass. Signed by 2 members: Representatives Hoff, Ranking Minority Member; Mosbrucker, Assistant Ranking Minority Member.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not part of the legislation nor does it constitute a statement of legislative intent.

Staff: Lily Smith (786-7175).

Background:

Multiple state laws provide protections for employees and contain various mechanisms to enforce the protections. Administrative remedies include civil penalties and recovery of back wages.

Wages.

Wage laws include the Minimum Wage Act and the laws relating to prevailing wage. The Wage Payment Act (WPA) authorizes an employee to file a wage complaint with the Department of Labor and Industries (Department) regarding a failure to pay minimum wage or overtime, a failure to pay contracted-for wages, and other wage claims. The Department may obtain wages and interest for an employee and may order the employer to pay a civil penalty if the violation was willful. Under prevailing wage laws, the Department may also obtain wages and assess a civil penalty for a failure to pay prevailing wages.

Other wage laws include provisions on health care facility employee overtime and seasonal labor provisions.

Safety.

The Washington Industrial Safety and Health Act (WISHA) authorizes, and in some cases requires, a civil penalty be imposed on an employer for violation of safety and health standards.

Under the WISHA, an employer may request a consultation, during which time no penalties may be imposed. Other laws specific to certain industries, such as late-night retail establishments and health care settings, are enforced under the WISHA.

Leave.

Leave laws include paid sick leave and military family leave. The Department may assess penalties for violations of these laws and may also order a reinstatement of hours or compensation under paid sick leave.

Discrimination.

If an employer discriminates against an employee based on a protected-class status, the Washington State Human Rights Commission (Commission) may order back pay, hiring, reinstatement, and other remedies.

Other.

The Industrial Welfare Act contains a number of standards, such as the Family Care Act and child labor laws. It is also the authority for the Department's rules on meals and rest breaks. Other employment laws include regulation of farm labor contractors and laws protecting health care employee whistleblowers.

Medicaid Fraud False Claims Act.

The Medicaid Fraud False Claims Act (MFFCA) authorizes a person, the relator, to bring an action, known as a qui tam action, to seek a civil penalty for Medicaid fraud. The relator must serve a copy of the complaint on the Attorney General (AG), who may intervene in the action. The relator receives a percentage of any penalty, with the percentage depending on whether the AG intervened and other factors, and attorneys' fees and costs.

Summary of Substitute Bill:

The Worker Protection Act is established, under which a qui tam action is authorized for violations of employment laws.

Qui Tam Action Authorized.

Aggrieved persons, whistleblowers, or their designated representative entity may bring a qui tam action as a relator for any relief the specified state agency (agency) may seek, including penalties and damages, subject to the same conditions and limitations that apply to the agency.

A qui tam action may be brought to enforce the following laws and all associated rules enforced by the Department:

- the Minimum Wage Act;
- laws relating to the payment of wages, including the WPA, and wage rebate laws;
- prevailing wage;
- health care facility employee overtime;
- the WISHA, and other safety laws enforced under the WISHA, including standards for late night retail establishments;
- leave laws, including military family leave and paid sick leave;
- laws relating to gender equal pay and advancement opportunities;
- laws relating to agricultural labor and farm labor contractors; and
- laws granting the authority to the Department for meal and rest break rules and which contain other labor standards.

Also included are the Washington Law Against Discrimination and the health care employee whistleblower retaliation protection law, enforced by the Commission.

No qui tam action may be brought:

- if the employer demonstrates that the agency already resolved the merits of the violation;
- in general, with respect to a license, variance or permit, or for specified violations, such as violations of posting or reporting requirements; or
- with respect to WISHA, for any violation that is included within the scope of a consultative visit by the Department.

The right to bring an action may not be impaired by a private agreement. A qui tam action is a public action and does not preclude an action by an individual, but a court shall offset any award in one action by the amount paid to the same employee in another action.

Qui Tam Process.

General.

A relator must first give the agency and employer notice of the claim. The agency is subject to timeframes for its decisions regarding its role, any investigation, and notice to the relator. The relator may commence the qui tam action if the agency does not investigate or make a determination within those timeframes. The relator is then also subject to timeframes for bringing the action.

Once a qui tam action has commenced, the agency may intervene under certain conditions and assume primary responsibility. The agency and the AG may take certain actions to prevent representation by a particular attorney in a qui tam action.

Settlements.

As part of its investigation, the agency may attempt to settle the violation. If the settlement provides not less than 100 percent of any wrongfully withheld wages or benefits, including interest, the settlement precludes further claims for the same wages or benefits.

The relator and the AG receive various notice and opportunities to be heard if the agency proposes to settle or dismiss the action after intervening. If the relator proposes to settle a qui tam action, the settlement must be submitted to the agency and to the AG.

A standard is provided for court approval of settlements or dismissals.

Distribution of Awards.

Any penalty amounts recovered are distributed as follows: (1) if the agency does not intervene, 40 percent to the relator and 60 percent to the agency; and (2) if the agency intervenes, 20 percent to the relator and 80 percent to the agency. Penalties received by the relator must be equitably distributed to the aggrieved parties, subject to review by the agency, except that the relator is entitled to a proportionate service award.

A relator that prevails is entitled to reasonable attorneys' fees and costs.

Any damages recovered must be distributed to the aggrieved employees.

Retaliation.

Retaliation against an employee for involvement in a qui tam action is prohibited. Remedies for retaliation are specified, including a qui tam action.

Substitute Bill Compared to Original Bill:

The substitute bill:

- specifies that a qui tam action may be brought to enforce the rules of each specified law as well as the underlying law;
- specifies that both administrative enforcement and civil action authority may be available to an agency or relator;
- provides timeframes for the relator to provide notice to the agency, commence a qui tam action, and add any other violations to the action;
- specifies that the statute of limitations for a qui tam claim is tolled from the earlier of the date the notice is filed with the agency or the agency begins an applicable investigation;
- specifies that agency resolution of the merits of a violation, not a particular type of determination, precludes a qui tam action;
- specifies that provisions related to agency resolution and the availability of a qui tam action are based on each alleged violation, not general actions;
- specifies that a court must offset restitution or damages paid to an employee by that paid in another action;
- removes the law relating to safety for underground workers as a law that may be enforced under a qui tam action;
- changes the timeframe for expedited agency investigations of qui tam retaliation from 30 to 90 days; and
- removes the new accounts for receipts of penalties and instead directs that penalties be deposited in accordance with the laws under which they are assessed.

Appropriation: None.

Fiscal Note: Requested on January 12, 2021.

Effective Date of Substitute Bill: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) While many workers' conditions do not meet the legal standard, there is a fear of retaliation for making a complaint, and state enforcement resources are insufficient. Current workplace laws do not provide the protection they were intended to provide, so another pathway is needed. Worker issues have been exasperated under the COVID-19 pandemic, and certain populations have been impacted more than others. People want to be able to keep their jobs and provide for their families, but they are subjected to overlapping layers of risk. Workers should be able to stand up for themselves. The increased use of arbitration agreements increases the need for this process. Workplace protections were created for private attorneys to enforce, but now there are roadblocks to that enforcement

that the bill is needed to clear. This bill makes it easier to enforce existing standards, especially in situations where one employee is better situated to bring an action for their more vulnerable coworkers. Opposition to the bill is essentially opposition to complying with the law. The qui tam model is not new, and can be carefully calibrated to avoid issues with existing tools. The federal qui tam law provides an example of a good balance that has saved significant taxpayer money. Qui tam actions benefit from specialization and experience. The bill should also support community enforcement.

(Opposed) The existing workplace laws already have carefully crafted and balanced enforcement provisions that this bill would upend. Agencies already do a very good job with enforcement. Workers under arbitration agreements already have a remedy. Anyone would be able to expose employers to liability regardless of whether the employees wanted the action. The nature of the qui tam process is problematic, as the existing example in California shows. These actions are not brought due to a lack of government enforcement, and can be brought for technical violations with severe financial consequences. The bill lacks several important elements of the federal qui tam law, and provides no real gatekeeping for these actions. The relationship between enforcement in the bill and existing law is unclear, such as how it would work with agency processes. The bill creates an unconstitutional delegation of the enforcement obligations of the state and incentivizes predatory entities. The bill would enrich trial lawyers more than it would benefit employees, and would put Washington businesses at a disadvantage in an already difficult time, particularly small businesses. The scope is far too broad and there is no real due process for employers. Consequences can include employer bankruptcy and a loss of jobs.

Persons Testifying: (In support) Representative Hansen, prime sponsor; Rachel Lauter, Clare Thomas, and April Frazier, Working Washington; Kelvin Encarnacio, United Food and Commercial Workers 21; Kasi Perreira and Sybill Hyppolite, Washington State Labor Council; Agustin Lopez; Jane Hopkins, Service Employees International Union Healthcare 1199NW; Sheallea Allen, Pride at Work; David Engstrom, Stanford Law School; Julia Barcott; and Hardeep Rekhi, Rekhi and Wolk Attorneys.

(Opposed) Jim King, Independent Business Association; Robert Battles, Association of Washington Business; Tim O'Connell, Stoel Rives LLP; Dan Spurgeon, Martens and Associates; Derek Bishop, Washington Defense Trial Lawyers; Tom Manzo, Liability Reform Coalition; Tom Kwieciak, Washington Construction Industry Council; Kyle Levine, Alaska Airlines; and Lisa Thatcher, Washington State Hospital Association.

Persons Signed In To Testify But Not Testifying: None.

HOUSE COMMITTEE ON APPROPRIATIONS

Majority Report: The second substitute bill be substituted therefor and the second substitute bill do pass and do not pass the substitute bill by Committee on Labor & Workplace Standards. Signed by 17 members: Representatives Ormsby, Chair; Bergquist,

Vice Chair; Gregerson, Vice Chair; Macri, Vice Chair; Chopp, Cody, Dolan, Fitzgibbon, Frame, Hansen, Johnson, J., Lekanoff, Pollet, Ryu, Senn, Stonier and Sullivan.

Minority Report: Do not pass. Signed by 16 members: Representatives Stokesbary, Ranking Minority Member; Chambers, Assistant Ranking Minority Member; Corry, Assistant Ranking Minority Member; MacEwen, Assistant Ranking Minority Member; Boehnke, Caldier, Chandler, Dye, Harris, Hoff, Jacobsen, Rude, Schmick, Springer, Steele and Tharinger.

Staff: Heidi Cao (786-7157).

Summary of Recommendation of Committee On Appropriations Compared to Recommendation of Committee On Labor & Workplace Standards:

The second substitute bill prohibits bringing a qui tam action solely for a recordkeeping violation.

The following are removed as laws that may be enforced under a qui tam action. Laws relating to:

- seasonal labor;
- safety in health care settings;
- safety in late night retail establishments;
- asbestos safety;
- military family leave;
- agricultural labor; and
- health care employee whistleblower retaliation protection.

The requirement that penalties distributed to an agency be used for enforcement and education is removed.

A severability clause related to receipt of funds and qualification of the state plan under federal Occupational Safety and Health Administration requirements is added.

A null and void clause is added.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Second Substitute Bill: The bill takes effect 90 days after adjournment of the session in which the bill is passed. However, the bill is null and void unless funded in the budget.

Staff Summary of Public Testimony:

(In support) This bill has already changed in order to smooth out the qui tam process. The current fiscal note does not reflect the revenue the state will receive from increased penalties recovered. The similar law in California provides an example of significant penalties received in addition to wages. This bill only addresses what is required to enforce the current law, and it does not change the underlying laws. There are not enough resources to enforce current laws and there is a need for this type of enforcement. Many underpaid workers are first generation immigrants and are already marginalized. Companies are able to exploit these workers without consequence.

(Opposed) Some employees are paid under federal rules in unique interstate environments that can make compliance with technical requirements impossible. A low percentage of complaints under the bill will be able to be investigated, and increased lawsuits will directly harm the recovery from the current crisis. There will be little or no gain to workers from either litigation or settlements. There are existing effective enforcement processes and remedies in statute. If agencies need more resources, budget allocations should be explored. This bill will open the door to abuse of the qui tam process for financial gain, which will go to plaintiffs' attorneys. The full costs of the bill are not reflected in the current fiscal note, and many small businesses will not be able to afford the associated litigation. There will be fewer resources for improving wages and benefits.

Persons Testifying: (In support) Representative Hansen, prime sponsor; Larry Shannon, Washington State Association for Justice; and Zenia Javalera, Service Employee International Union 6.

(Opposed) Cameron Cloar-Zavaleta, Alaska Airlines; Julia Gorton, Washington Hospitality Association; Lisa Thatcher, Washington State Hospital Association; Christine Brewer, Associated General Contractors and Washington Construction Industry Council; Catherine Holm, Washington Food Industry Association; Robert Battles, Association of Washington Business; and Jim King, Independent Business Association.

Persons Signed In To Testify But Not Testifying: None.